IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1944.**

**No**

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In the Matter

of

ALFRED M. ROGERS,

Bankrupt.

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FLORENCE HILLS ROGERS,

Petitioner,

—against—

SOLOMON RAFFE, Trustee in Bankruptcy of Alfred M. Rogers,

Respondent.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts are stated in the petition, *supra*, pages 2-12.

## POINT I.

**The decision sought to be reviewed is in direct conflict with decisions of this Court and of other Circuit Courts of Appeals which hold that**

**(a) The Referee in bankruptcy has no jurisdiction summarily to determine the adverse claim of a third party and**

**(b) An adverse claim is made out by presenting sworn testimony which, if believed by a court, would support a finding for the claimant.**

The Referee below rejected the claim of petitioner herein after weighing what he regarded as conflicting testimony adduced by the Trustee and the petitioner (462-4, 466-7).

It is now the law in all jurisdictions (except in the Second Circuit) that in determining whether or not he has summary jurisdiction to order a turnover, a Referee in bankruptcy may conduct a hearing only to the point where it appears that the respondent is making a claim adverse* to the Trustee, supported by sworn testimony which, if true, would make the claim valid; the Referee may not weigh testimony against testimony to determine where the truth lies. That function is reserved to the finders of the facts at a plenary trial.

This Court recognized this rule in *Harrison* v. *Chamberlin* (1926), 271 U. S. 191, where it stated (p. 194):

> "In the present case it clearly appears that the validity of the respondent's claim depended upon *disputed facts, as to which there was a conflict of evidence*, as well as a controversy in matter of law. * * * *It was therefore substantial, and not merely colorable;* and its merits could only be adjudged in a plenary suit." (Italics ours.)

In accord, see

*Babbitt* v. *Dutcher* (1916), 216 U. S. 102, 114;

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* See *In re Blum* (C. C. A. 7th Cir. 1913), 202 Fed. 883, where the court wrote (p. 884):

> "The term 'colorable' seems to have crept into the bankruptcy decisions without authority of statute, unless it be construed to mean merely that if a respondent sets up as facts, and not as conclusions of law, matters which, if true, would constitute a statement of an adverse claim, then the claim would be adverse and not colorable, and not within the jurisdiction of the referee."

*Jaquith* v. *Rowley* (1903), 188 U. S. 620, 625;
*Mueller* v. *Nugent* (1901), 184 U. S. 1, 15;
*In re Blum* (C. C. A. 7th Cir. 1913), 202 Fed. 883, 884;
*Cooney* v. *Collins* (C. C. A. 9th Cir. 1910), 176 Fed. 189, 192;
*In re Farrow* (D. C. D. Mass. 1926), 13 Fed. (2d) 261;
*In re Green* (D. C. E. D. Pa. 1913), 207 Fed. 693, 695;
*In re Tarbox* (D. C. D. Mass. 1910), 185 Fed. 985.

See also *In re Goldstein* (C. C. A. 7th Cir., 1914), 216 Fed. 887, where the court said at pages 888-889:

> "The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. But substantiality appears as soon as the claimant, in response to the rule to show cause, presents his verified answer, which is unmet by the trustee, or which, if met by a replication, is supported by sworn testimony of facts, which, if true, would show title and possession antedating the petition in bankruptcy. *A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the District Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit.*" (Italics ours.)

The rule in the Second Circuit was formerly in complete harmony with that approved by this Court and applied by other Circuit Courts of Appeals. See

*In re Midtown Contracting Co.* (C. C. A. 2d Cir. 1917), 243 Fed. 56, cert. den. 245 U. S. 654;
*In re Yorkville Coal Co.* (C. C. A. 2d Cir. 1914), 211 Fed. 619;
*In re Paramount Fireproof Door Co. Inc.* (D. C. E. D. N. Y. 1930), 43 Fed. (2d) 558, 559;

*In re Sheinbaum* (D. C. S. D. N. Y. 1901), 107 Fed. 247.

Thus in *In re Yorkville Coal Co., supra*, the problem as to the Referee's proper function was concisely posed as follows (p. 620):

> "The question which comes before this court is whether a bankruptcy court in a summary proceeding to determine whether an adverse claim existed in fact at the time of the filing of a petition in bankruptcy or was simply 'colorable', has a right to pass upon the truthfulness of the witnesses and the weight of the testimony and thus determine the merits of the claim."

To that question a negative answer was given, the court declaring that the bankruptcy court should not (p. 620) "weigh testimony against testimony" and could not (p. 620) "find certain testimony to be true and certain testimony not to be true". The correct test (albeit by the decision below no longer the rule in the Second Circuit) as laid down in the *Yorkville Coal Co.* case, *supra*, is as follows:

> *"The basis of an adverse claim is disclosed by the testimony when it is of such a nature that, if submitted in a court and no evidence is offered in contradiction, it would be sufficient to support a judgment in favor of the claimant."* (Italics ours.)

However, a serious doubt was generated as to the authority of the foregoing decisions in the Second Circuit by the opinion rendered in 1939 by the Circuit Court of Appeals for the Second Circuit in the case of *In re Meiselman*, 105 Fed. (2d) 995, where the court, although holding that the claims there considered were "substantial controversies" and "that consequently the referee had not jurisdiction to pass the summary order" (p. 1000) said by way of dicta (p. 998):

> "We do not interpret these decisions as requiring the holding that there is reasonable doubt from the

> claimant's own testimony alone, when it is disbelieved by the referee * * *. The referee must proceed to determine whether the adverse claim is 'plainly without color of merit and a mere pretense' on a proper weighing of the testimony considered in the light of the claimant's self-interest * * *."

Said dicta by the Circuit Court for the Second Circuit in the *Meiselman* case, *supra*, was translated into the law of the Second Circuit by the decisions below, which clearly change the rule previously recognized in the Second Circuit and hold, in conflict with decisions of this Court and of other Circuit Courts of Appeals, that

(a) A referee in bankruptcy may weigh the merits of a controversy in a summary turnover proceeding.

(b) A referee's determination on the merits of a controversy involving a contested issue of fact is not reversable unless "clearly erroneous".

(c) As the petitioner (defendant in the summary proceeding) was found not to have sustained her burden of proof of ownership, "the (petitioner's) claim in these proceedings was thus shown to be merely colorable", and that, therefore, "the summary jurisdiction of the court was properly invoked and exercised" (647).

## CONCLUSION.

**In view of the foregoing, it is respectfully submitted that a writ of certiorari be granted.**

Respectfully submitted,

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